84-1714

Office-Supreme Court,
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ALEXANDER L. STEV
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN H. SLINGERLAND,
Appellant,

— vs. —

PAUL N. OLSON, as Chairman of the Vermont Board of Bar Examiners, THE VERMONT BOARD OF BAR EXAMINERS, and THE VERMONT SUPREME COURT,
Appellees.

On Appeal from the Vermont Supreme Court

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Does the Due Process Clause of the Fourteenth Amendment apply to the Appellant's interest in being admitted to the Bar of the Vermont Supreme Court?

Have the minimum requirements of due process been met by the procedure for review set forth by VT. STAT. ANN. tit. 12, App. I, Pt. II, §§ 10(e), (f) and (g)?

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[1]The parties to the proceedings in the Vermont Supreme Court were Paul N. Olson, Chairman of the Vermont Board of Bar Examiners, and the Vermont Board of Bar Examiners whose members at that time were Leslie S. Linton, Patricia A. Barr, Nancy E. Kaufman, Vincent H. Naramore, Brooke Pearson, Douglas Richards, and Charles R. Tetzlaff.

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OPINION BELOW

The opinion of the Vermont Supreme Court in *In*
Slingerland v. Board of Bar Examiners, No. 84-569 (Vt.,
February 5, 1985) is attached hereto as Appendix B. The
of the Chairman of the Board of Bar Examiners is a letter
Slingerland dated November 14, 1984, and is attached h
Appendix A.

JURISDICTION

Appellant appeals from the judgment of the Vermont S
Court denying his petition for extraordinary relief. Said peti
brought as an original action pursuant to VT. STAT. ANN
App. I, Pt. II, § 13(b) (1982) and V.R.A.P. 21(b). A
sought review in the Vermont Supreme Court of the Cha
the Vermont Board of Bar Examiner's adverse decision r
his July 1984 bar examination score. Said petition challe
constitutionality of VT. STAT. ANN. tit. 12, App. I, Pt. II,
(f) and (g) under the Due Process Clause of the Fo
Amendment.

The judgement of the Vermont Supreme Court denyi
was entered Feb. 5, 1985. The Notice of Appeal was file
court Feb. 20, 1985.

The jurisdiction of the Supreme Court to review this de
appeal is conferred by 28 U.S.C. § 1257(2). Appellant chall
constitutionality of a state statute which has been uphe
highest court in the State of Vermont. The following cases
jurisdiction of the Supreme Court to review on direct a
judgment in this case: *Lathrop v. Donahue*, 367 U.S. 820
(1961); *District of Columbia Court of Appeals v. Feldma*
Ct. 1303, 1316-1317 (1983).

STATUTES INVOLVED

The statute challenged by the Appellant is VT. STAT. AN
App. I. Pt. II, §§ 10(e), (f) and (g), (1982), Rules of Admiss
Bar of the Vermont Supreme Court, which provides in
part:

Sec. 10. Examinations

(e) The decision of the Board as to which applicants pa
which applicants fail an examination shall be final, except
showing of misconduct on the part of one or more membe
Board.

(f) An applicant who takes and fails to pass the essay or M
Bar Examination part of the bar examination may peti
review by the Board. The petition must be made in writin
Clerk of the Supreme Court within thirty days of mailin
examination results. The Board need not explain th
received but shall provide review as follows:

(1) a photocopy of the applicant's essay examination ans
(2) a copy of a model answer, a grading guide and a typ
answer for each question;
(3) handscoring by Educational Testing Service of the M
Bar Examination;
(4) verification of arithmetic computations for the essa
nation; and
(5) verification of grades reported.

(g) Within fourteen days of mailing of the review results p
for in § 10(f), an applicant may appeal to the Chairm
appeal shall be in the form of a written petition which
forth specifically and in detail any claim of misconduc
examiner or the Board. The Chairman shall render a
writing within thirty days of receipt of the petition as to
the appeal has substantial merit. If the Chairman finds su
merit to the appeal, it shall be referred forthwith to the fu
less any examiner whose conduct is the subject of the a
the Chairman finds no substantial merit to the appeal, th
man shall inform the applicant in writing of the decisio
shall be final.

Also involved in this appeal is Section 13(b) of the
Admission to the Bar of the Vermont Supreme Court:

Section 13: Miscellaneous

(b) Except as otherwise provided by these Rules any i
may appeal from a decision of the Board of Bar Exam
filing an action with the Vermont Supreme Court as a
original jurisdiction pursuant to the Rules of Appellate P

The foregoing statutes, with the exception of § 13(lenged under the Fifth Amendment and the Fourtee ment of the United States Constitution:

AMENDMENT V

No person shall be...deprived of life, liberty, or prope due process of law.

AMENDMENT XIV

Section 1.

No state shall...deprive any person of life, liberty, without due process of law....

STATEMENT OF THE CASE

On October 9, 1984 after receiving a failing score on t essay portion of the Vermont Bar Examination, App petition for review before the Chairman of the Verm Bar Examiners pursuant to VT. STAT. ANN. tit. 12, A §§ 10(f) and (g) (1982).[2]

By letter dated November 14, 1984, the Chairma Appellant that he was unable to find any "misconduct" of any examiners or the Board in grading Appellant's e and that therefore he was unable to find any "substant Appellant's appeal.[3] The Chairman concluded that his tion was a "final determination" of Appellant's ap Section 10(g).

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[2] Under Section 10(f) Appellant was provided model answers, typic his answers and the examination questions. Appellant's essay exam of 35 which was one point short of the minimum passing score of model answers discussed 53 major points of law in the six essay qu lant's examination answers discussed 46 of these 53 points and a cussed 16 other relevant points of law. Altogether, Appellant's answ points of law while the Board's model answers discussed only 53. score on the essay examination was 60 points and since each of the answers presumably received 10 points, Appellant sought review o grading discrepancies between his answers and each of the Board's These discrepancies were outlined in detail in his petition for review.

[3] Section 10(g) of the Vermont statute restricts review of graded bar specific claims of examiner "misconduct". Although the statute "misconduct", it is apparent that Section 10(g) does not provide for which set forth specific allegations of grading errors.

On November 30, 1984 Appellant filed a verified com extraordinary relief with a supporting memorandum of Vermont Supreme Court pursuant to VT. STAT. ANN. ti I, Pt. II, § 13(b) (1982) and V.R.A.P. 21(b). A complaint requested review of his examination by the Supreme Court. It also requested the court, in the alter declare Sections 10(e), (f) and (g) of the Rules of Admiss Bar unconstitutional under the Due Process Clause of and Fourteenth Amendments since the rules do no review of graded bar examinations.

On February 5, 1985 the Vermont Supreme Court issu per curiam opinion which denied Appellant relief on th that the Chairman had found no substantial merit to p claim of "examiner misconduct". The court declined co Appellant's claim that this standard of review denies due p

Although Appellant passed the Multistate Exami July of 1983, he has failed the essay portion of the Ver Examination three times. He appeals from an determination by the Chairman for a second time.[4]

THE QUESTIONS PRESENTED ARE SUBSTAN

In *Schware v. Board of Bar Examiners,* 353 U.S. 238, this Court said that "A state cannot exclude a person

[4]Prior to this appeal, Appellant sought review of the essay po February, 1984 Vermont Bar Examination by filing a 32 page review before the Chairman pursuant to the same statute cited ab examination, a perfect score was 30 points (5 points per question) a score was 18. Appellant received 16 points or 2 points below a passi appealed his score on 3 of the 6 examination questions. The Bo answers to two of these three questions discussed 32 points of law points of law, Appellant's answers discussed 26 points while the answers, which presumably also received a perfect score of 5 discussed only 19 points. In addition, Appellant's answer to the th together with these first two questions raised 77 additional releva law omitted in the Board's model answers. Appellant received only these three questions while the model answers and the typical presumably received a perfect 15 points. In his prior appeal of th 1984 essay examination the Appellant was denied review by the C the same grounds. The Vermont Supreme Court affirmed that deci reviewing his examination. Both decisions will be part of the recor

practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Appellant sought review of his failing grade on the Vermont bar examination. Both the Chairman of the Board of Bar Examiners and the Vermont Supreme Court summarily denied review in violation of this constitutional provision.

One of the purposes of due process is to afford protection against erroneous decision-making. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1975). But VT. STAT. ANN. tit. 12, App. I. Pt. II, §§ 10(e) and (g) (1982) provide review of an examination only "upon a showing of misconduct on the part of one or more members of the Board." The Vermont Supreme Court has effectively held that this statute precludes review of grading decisions. *In re John Slingerland v. Board of Bar Examiners,* 144 Vt. 647, 480 A.2d 424 (1984) (by implication). *See also In re Petition of Robert Halpert,* 143 Vt. 647, 467 A.2d 125 (1983) (by implication).

This Court has never decided the constitutionality of a state statute which does not permit review of graded bar examinations. As a result, there is substantial confusion and contradiction among the lower courts, both state and federal, on this issue. The Vermont Supreme Court decisions in *In re Monaghan,* 126 Vt. 53, 222 A.2d 665 (1966) and *In re Monaghan,* 126 Vt. 193, 225 A.2d 387 (1966) and the federal court decision in *Welch v. Smith,* 486 F. Supp. 153 (D. Vt. 1980) illustrate the contradictions, confusion, and deficiencies in this area of constitutional law.

In *In re Monaghan,* 126 Vt. 53, 222 A.2d 665 (1966), the Vermont Supreme Court held that the Due Process Clause requires an opportunity for a hearing and judicial review in matters involving determinations of moral character and fitness to practice law. *In re Monaghan,* at 56, 65, 222 A.2d at 669, 675 (citing *Schware v. Board of Bar Examiners,* 353 U.S. 238 (1957) and *Willner v. Committee on Character,* 373 U.S. 96 (1963)). Four months later, after Monaghan had re-taken the examination, received a failing grade, and appealed to the Vermont Supreme Court, the court held that "in the matter of examining and grading applicants for admission to the bar...the members of the board are the exclusive judges." *In re Monaghan,* 126 Vt. 193, 194, 225 A.2d 387 (1966). To confuse matters more, the court next said: "We will not embark on an investigation to ascertain the probity of the results certified to the

Court in the absence of clear and unequivical allegations of probative facts to establish imposition, discrimination and manifest unfairness." *In re Monaghan,* 126 Vt. at 194, 225 A.2d at 387.

In *Welch v. Smith,* 486 F. Supp. 153, 156 (1980), Judge Coffrin laid bare the contradiction in *In re Monaghan,* 126 Vt. 193 (1966), and pointed out the constitutional problem with the Vermont Supreme Court's position:

> Vermont lacks a formal procedure by rule or statute for review of an adverse Board determination, in contrast to some states. See *Richardson v. McFadden,* 563 F.2d 1130, 1132 n.3 (4th Cir. 1977) (Hall, J., concurring) (South Carolina); *Chaney v. State Bar of California,* 386 F.2d 962, 966 (9th Cir. 1967) (California). Yet by itself this lack inflicts no denial of due process or equal protection since the Vermont Supreme Court has the inherent power to hear the petition of an unsuccessful bar applicant. See *Feldman v. State Board of Law Examiners,* 438 F.2d 699, 702-03 (8th Cir. 1971)....Despite the Vermont Supreme Court's statement that "[i]n the matter of examining and grading applicants...the members of the [B]oard are the exclusive judges," id., we conclude that under Vermont law the Board's adverse recommendation cannot cause a "deprivation" under 42 U.S.C. § 1983. Only the final action of the supreme court, whatever form it may take, effects such a deprivation, if any. *Chaney,* 386 F.2d at 966.[5]

Despite Judge Coffrin's suggestion in *Welch v. Smith,* the Vermont Supreme Court refuses to exercise its inherent power to review Appellant's claims. *In re John Slingerland v. Board of Bar Examiners,* No. 84-569 (Vt., decided February 5, 1985). See also *In re Slingerland v. Board of Examiners,* 144 Vt. 647, 480 A.2d 424 (1984)

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[5] In *Welch v. Smith,* Judge Coffrin provided the Vermont Supreme Court with an out: "The supreme court impliedly has approved the Board's determination that plaintiff is not qualified for admission and thus has taken final action on his application." *Welch* at 156. In the present case, the Vermont Supreme Court has not "impliedly approved" the Board's decision. Rather, the court has blindly accepted the Chairman's decision without reviewing it. The court has also refused to decide the due process issue. In *Willner v. Committee on Character,* 373 U.S. 96, 106-107 (1963), this Court said: "In reviewing state action in this area, as in all others, we look to substance, not to bare form, to determine whether constitutional minimums have been honored."

and *In re Petition of Robert Halpert,* 143 Vt. 647, 467 A.2d 125 (1983).[6]

In *Schware v. Board of Bar Examiners,* 353 U.S. 238, 239 (1957), this Court said that the Due Process Clause applies to grading decisions as well as determinations of moral character and fitness to practice law:

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas v. Noble,* 261 U.S. 165... *Cummings v. State of Missouri,* 4 Wall. 277, 319-320....Even in applying permissable standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards.... [7]

Of equal importance, this Court said that the requirements of the Due Process Clause apply regardless of how the various States characterize their bar admission rules:

> We need not enter into a discussion whether the practice of law is a "right" or "privilege". Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is

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[6]Some courts have granted review of graded bar examinations. *Powell v. Nigro,* 543 F. Supp. 1044 (D. D.C. 1982); *Cupples v. Marzall,* 101 F. Supp. 579 (D. D.C. 1952); *Petition of W.M. I.,* 394 A.2d 207 (Del. 1978); *Kennedy v. Educational Testing Service, Inc.,* 393 A.2d 523 (D.C. 1978); *Harper v. District of Columbia Committee on Admissions,* 375 A.2d 25 (D.C. 1977); *In re Mead,* 372 Mass. 253 361 N.E. 2d 403 (Mass. 1977); *Davidson v. New York State Board of Law Examiners,* 86 Misc. 2d 744, 382 N.Y.S. 2d 418 (1976); *In re Hughey,* 62 Nev. 498, 156 P.2d 733 (1945); *Petition of Wayland,* 510 P.2d 1385 (Okla. 1972); *Hooban v. Board of Governors of Washington State Bar Associations,* 5 Wash. 2d 774, 539 P.2d 686 (1975). Other courts have denied review. *Lucero v. Ogden,* 718 F.2d 355 (10th Cir. 1983); *Sutton v. Lionel,* 585 F.2d 400 (9th Cir. 1978); *Singleton v. Louisiana State Bar Association,* 413 F. Supp. 1092 (D. La. 1976); *Whitfield v. Illinois Board of Bar Examiners,* 504 F.2d 474 (7th Cir. 1974). Unlike any of these appeals, Appellant has presented specific evidence of grading errors.

[7]In *Application of Peterson,* 459 P.2d 703, 710 (Alaska 1969) (citing *Schware v. Board of Bar Examiners,* 353 U.S. 232), the Alaska Supreme Court reached "a conviction that an applicant's rights in regard to the grading of his examination papers and his ultimate right to pursue the occupation of an attorney should be as fully protected as these same occupational rights are when questions of moral

not a matter of the State's grace. *Ex parte Garland,* 4 Wall. 333, 379, 18 L. Ed. 366. *Schware* at 239.

This was another way of saying that in the area of bar admissions, applicants do not have to take "the bitter with the sweet" in looking to state law for protection of their interests. *Compare Arnett v. Kennedy,* 416 U.S. 134, 153 (1974). Furthermore, one's right to engage in "any of the common occupations of life" has been held by this Court to be a liberty interest independently protected under the Due Process Clause of the Fourteenth (and Fifth) Amendment. *Board of Regents v. Roth,* 408 U.S. 564, 571 (1972) (citing *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)).[8] *See also* L. Tribe, *American Constitutional Law* 948-953 (1978). As such, this interest does not depend on state law for constitutional protection since it has its origins in the Bill of Rights. U.S. CONST. Amend. V. This fact has been acknowledged in Vermont. *In re Monaghan,* 126 Vt. 53, 222 A.2d 665, 675 (1966) (citing *Schware v. Board of Bar Examiners,* 353 U.S. 232 and *Ex parte Garland,* 4 Wall. 333).[9]

Even if the right to engage in the legal profession were viewed as being entirely a matter of state law, the Vermont Supreme Court Rules of Admission to the Bar provide for review of graded examination booklets. See VT. STAT. ANN. tit. 12, App. I, Pt. II, §§ 10(f) and 13(b) (1982).[10] As noted above, the Vermont Supreme Court has said that it will review petitions which present claims of "manifest

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character or discipline of the applicant are involved." The court held that the minimum requirements of a fair procedure demand that an applicant be provided model answers, typical best and worse answers, and copies of his own answers in order to assure a meaningful appellate hearing on the merits. *Application of Peterson,* 459 P.2d at 709. A distinction should be noted between the petitioners' claims in *Application of Peterson* and *In re Monaghan,* 126 Vt. 193 (1966), which apparently lacked the benefits of a comprehensive grading guide, and Appellant's claim which presents well-documented evidence of serious discrepancies in grading determinative of his failing grade. Many courts grant review for such claims. See note 6, supra.

[8] While this court has not attempted to define with exactness the liberty...guaranteed (by the Fourteenth Amendment), the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life..." *Meyer* at 399.

[9] "Irrespective of whether the practice of law is a right or a privilege, a person cannot be prevented from practicing law except for valid reasons, such practice not being a matter of the state's grace." *In re Monaghan,* 126 Vt. at 65, 222 A.2d at 675.

[10] Section 10(f) reads in part. "An applicant who takes and fails to pass the essay or

unfairness". *In re Monaghan,* 126 Vt. 193, 194, 225 A.2d 387 (1966)

In this case, however, the Vermont Supreme Court and i Chairman have refused to review Appellant's petition which pre ents compelling, documented evidence under Section 10(f) of seriou grading discrepancies. This has resulted in a judicial disregard fundamental constitutional rights in an area of the law which th court itself administrates.[11] It is therefore in the mutual interest of a parties, all courts, and all States to receive the clear guidance which lacking and which only this Court can provide.

CONCLUSION

Judge Friendly notes that in the area of mass justice, question have largely been limited to fair procedure. He advises self-restrain on the part of courts and a combination of fair procedure an adequate statement of reasons on the part of agencies. Friendly *Some Kind of Hearing,* 123 U Pa. L. Rev. 1267, 1294-95 (1975).[12] In Professor Rabin's description of the layered approach to view ing due process, there is agreement with Judge Friendly:

> [A]s we respond to less exigent claims by peeling away th layers of protection — indeed as we strip away any semblanc of a "hearing" — it is essential that we retain the core safeguar against arbitrariness, the right to receive a meaningful explana tion of what is being done to the individual. Rabin, *Jo Security and Due Process,* 44 U. Chi. L. Rev. 60, 79 (1976).

This Court has also concurred in these views: "As Judge Friendly has written in a related context, when the State seeks "to deprive a

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Multistate Bar Examination part of the bar examination may petition for review b the Board." Section 13(b) reads: "Except as otherwise provided by these Rules an individual may appeal from a decision of the Board of Bar Examiners by filing a action with the Vermont Supreme Court as a matter of original jurisdictio pursuant to the Rules of Appellate Procedure."

[11]This Court has noted: "No conflict exists between constitutional requisites an exaction of the highest moral standards from those who would practice law....Ce tainly lawyers and courts should be particularly sensitive of, and have a specia obligation to respect, the demands of due process." *Willner v. Committee o Character,* 373 U.S. 96, 106 (concurring opinions of Justices Goldberg, Brenna and Stewart). See note 6 supra, and cases cited therein.

[12]This court has recognized the importance of reasoned decision-making in several

person of a way of life to which [he] has devoted years of preparation and on which [he] ha[s] come to rely," it should be required first to provide a "high level" of procedural protection." *Board of Curators, Univ. of Mo. v. Horowitz,* 435 U.S. 78, 100 (1978) (quoting *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1296-1297 (1975)). Appellant has not received either fair procedure or an explanation.

The Appellant claims that under the Due Process Clause he is entitled, at a minimum, to meaningful review and an explanation of any adverse recommendation by the Chairman given the compelling and unrefuted evidence that serious discrepancies exist between the Board's scoring guide and his answers. He claims that VT. STAT. ANN. tit. 12, App. I, Pt. II, §§ 10(e), (f) and (g) of the Rules of Admission to the Bar are unconstitutional under the Due Process Clause insofar as they restrict review to claims of "misconduct" (as well as fail to define it) and preclude review of grading errors.

Respectfully submitted,

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decisions. *Dunlop v. Bachowski,* 421 U.S. 560 (1975); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). While it may be true that the Chairman and the Vermont Supreme Court exercise discretion in reaching grading decisions as was noted by Judge Coffrin in *Rosenfield v. Clark et al,* 586 F. Supp. 1332 (D. Vt. 1984), it does not follow that they can ignore an applicant's statutory and constitutional right to a meaningful review procedure when he presents clear, comprehensive evidence of grading errors. As noted in *Citizens to Preserve Overton Park:*

> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority....[The Administrative Procedure Act] requires a finding that the actual choice made was not "arbitrary, an abuse of discretion, or otherwise not in accordance with law"....The final inquiry is whether the Secretary's action followed the necessary procedural requirements. Id. at 416.

Since the Secretary made no findings of fact or statement of reasons, this Court reversed and remanded his decision.

FITTS, OLSON, CARNAHAN, ANDERSON & BU

14 November 1984

Mr. John H. Slingerland
133 Loomis Street
Burlington, Vermont 05401

VERMONT BOARD OF BAR EXAMINERS

Ruling of Chairman on Appeal Under Rule Section 10(g)
July 1984 Examination
John H. Slingerland
Id. No. 56.

Dear Mr. Slingerland:

Your letter dated 9 October 1984 relating to the July 1984 Exan tion was received by me on 18 October 1984.

You have first requested review under Rule §10(f). I understand review has been provided to you as prescribed by Rule §10(f).

Your letter of 9 October was addressed to me as Chairman o Vermont Board of Bar Examiners and you state that it constitu petition for review of the July 1984 Bar Examination. Rule § requires that a written Petition must set forth specifically a detail any claim of misconduct by an Examiner or of the Board. state that there are serious grading discrepancies between the ing guide and your answers. You also stated in your letter t should be excluded and disqualified from a determination of Appeal. However Rule §10 does not provide for an Appeal to person other than the Chairman of the Board.

I have considered the points which you have set forth in the at ments to your letter relating to your answers to each of the ques on the July 1984 Essay Examination. I have also reviewed original Answer Booklets as to each of the Questions. I am not to find any misconduct on the part of any examiners or the Boa grading your answers. I therefore can find no substantial me your Appeal. This constitutes a final determination of your Ap under Rule §10(g).

Sincerely yours,

Paul N. Olson
Chairman

Appendix

ENTRY ORDER

SUPREME COURT DOCKET NO. 84-569
November Term, 1984
Filed February 5, 1985

In re John Slingerland .....

Board of Bar Examiners .....

APPEALED FROM:

Original Jurisdiction .....

DOCKET NO. .....

In the above entitled cause the Clerk will enter:

Under Rule 10(g) of the Rules of Admission to the Bar, th Chairman of the Board of Bar Examiners having found no substan tial merit to the petitioner's claim of examiner misconduct unde 10(e), the decision of the Chairman is final. Petition for extraordi nary relief denied.

William C. Hill, Associate Justice
Wynn Underwood, Associate Justice
Louis P. Peck, Associate Justice
Ernest W. Gibson III, Associate Justi

IN THE SUPREME COURT OF THE STATE OF VERMONT

JOHN H. SLINGERLAND
Appellant

v.

BOARD OF BAR EXAMINERS and PAUL N. OLSEN, CHAIRMAN
Appellees

No. 84-29

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John H. Slingerland, the app above named, hereby appeals to the Supreme Court of the States from the final judgment of the Vermont Supreme denying appellant's petition for extraordinary relief entered appeal on February 5, 1985.

This appeal is taken pursuant to United States Code Ti Section 1257(2). 28 U.S.C. Section 2403(b) may also be appl Proof of service is attached hereto and incorporated herein.

Dated at Burlington, Vermont this 25 day of February, 198

John H. Slingerland, *Ap*
Pro Se
133 Loomis Street
Burlington, Vermont 054

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

JOHN H. SLINGERLAND)
Appellant)
)
v.) N. 84-56
)
BOARD OF BAR EXAMINERS and
PAUL N. OLSEN, CHAIRMAN
Appellees

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL

NOW COMES John H. Slingerland who, after being duly swo
hereby deposes and says:

Copies of the attached Notice of Appeal were deposited i
United States Post Office with first class postage prepaid address
to:

1. Paul N. Olson, Chairman of the Vermont Board of B
Examiners
111 State Street c/o State Office Building P.O.
Montpelier, Vermont 05602
2. Jeffrey Amestoy, Attorney General for the State
Vermont
Pavilion Building
Montpelier, Vermont 05602
3. Office of the Clerk
Vermont Supreme Court
111 State Street c/o State Office Building
Montpelier, Vermont 05602

Dated at Burlington, Vermont this 20th day of February, 198

John H. Slingerl

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

At Burlington this 25th day of February, 1985 person
appeared John H. Slingerland and he acknowledged the forego
Affidavit to be true to his best knowledge and belief.

Before me, _____

Notary P

PROOF OF SERVICE

I, William E. Mikell, appearing as counsel for appellant
depose and say that on the day of April 26, 1985, I served three
of the foregoing Jurisdictional Statement on each of the fo
parties listed, appellees herein, by depositing the same in a
States post office, First Class postage prepaid to:

Paul N. Olson, as Chairman, member and representative
Vermont Board of Bar Examiners.
111 State Street
c/o State Office Building P.O.
Montpelier, Vermont 05602

Thomas J. Lehner, Clerk and Court Administrator
Vermont Supreme Court
111 State Street
Montpelier, Vermont 05602

John J. Easton, Attorney General for the State of Vermont
Pavilion Building
Montpelier, Vermont 05602

William E. M

Subscribed and sworn to before me at Burlington, Vermo
26th day of April, 1985.

Notary P

No.

IN THE
SUPREME COURT OF THE UNITED S

October Term, 1984

JOHN H. SLINGERLAND,
Appellant,

— vs. —

PAUL N. OLSON, as Chairman of the Vermont
Examiners, THE VERMONT BOARD OF BAR
and THE VERMONT SUPREME COU
Appellees.

On Appeal from the Vermont Supreme C

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel fo

WILLIA

444 So
Burlington

The Clerk is requested to notify counsel of actio
means of regular mail.

TES

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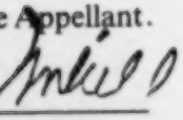
AMINERS,
,

t

e Appellant.



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he Court by

(2)

Office - Supreme Court, U
FILED
MAY 30 1985
ALEXANDER L. STEV
CLERK

No. 84-1714

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN H. SLINGERLAND,
Appellant,

--vs.--

PAUL N. OLSON, as Chairman of the Vermont Board of Bar Examiners, THE VERMONT BOARD OF BAR EXAMINERS, and THE VERMONT SUPREME COURT,
Appellees.

On Appeal from the Vermont Supreme Court

MOTION TO DISMISS

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State of Vermont

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Supreme Court Rule 15.1(h) 1

MOTION TO DISMISS FOR FAILURE TO ST
A SUBSTANTIAL CONSTITUTIONAL QUESTI

Appellees respectfully pray
this Honorable Court dismiss this a
because it fails to state reasons
the questions presented are
substantial as to require pl
consideration for their resolu
(Supreme Court Rule 15.1 (h))

I. THE STATE STATUTE INVOLVED AND T
NATURE OF THE CASE

A. The Statute

This appeal raises the questi
the validity of the Rules of Admi
of the Vermont Supreme Court (Ve
Statutes Annotated, Title 12, Ap
Pt.II, 1982). These rules provid
criteria to be used in grading an
examination and they establish
process of review for unsucce

applicants.

B. The Proceedings Below

Appellant sat for the July, 1 bar examination and, on or about Octo 3, 1984, received notification that failed the essay portion of the exami tion. After receiving notificati Appellant appealed to the Chairman the Board of Bar Examiners pursuant Vermont Statutes Annotated Title App. I, Pt. II §10(g)(Supp. 1984 In accordance with Section 10(g Appellant was provided with a copy his essay examination answers; a copy the model answer; a grading guide an typical best answer for each quest and verification of arithme computation for the essay examina and of grades reported.

On November 14, 1984, the Chai notified the Appellant that his peti

and his original answer bookl
been reviewed. Finding that th
been no misconduct on the part
examiner or the Board; the
therefore, could find no sub
merit to appellant's appeal.

Appellant next sought revie
Vermont Supreme Court by filing
tion for extraordinary relief
Statutes Annotated, Title 12,
Pt.II, §14(b) (Supp. 1984);
Rules of Appellate Procedur
21).[3] On February 5, 198
Vermont Supreme Court deni
petition since the Chairman of t
of Bar Examiners had fo
substantial merit to the c
examiner misconduct.[4]

II. ARGUMENT

The Case Presents No Substantial Co tutional Question

Appellant raises essentiall questions before this Court. Fir asserts that the Vermont Supreme refused to rule on the constitu validity of their rules and that refusal is ipso facto a denial process. Second, he makes a bold allegation that the lack of a J relating to grading errors[5] denial of due process, even Vermont affords an unlimited right examination.[6]

1. THE RULES OF THE VERMONT S COURT WHICH LIMIT THE SCOPE OF REV ISSUES OF MISCONDUCT, BUT PROVI UNLIMITED RE-EXAMINATION, DO CONTRAVENE THE REQUIREMENTS O PROCESS.

This Court has never consider question whether due process r

the type of review sought by
but several circuit courts hav
circuit courts have held
process is satisfied
unsuccessful applicant is give
to re-take the bar examinat
though no review process is
Tyler v. Vickery, 517 F.2d 1
4 (5th Cir. 1975) cert. de
U.S. 940 (1976); Brewer v.
691 F.2d 216 (5th Cir. 1982)
Board of Commissioners, 737
(11th Cir. 1984); Younger v
State Board of Law Examiners
372 (10th Cir. 1980); Poats
651 F.2d 495 (7th Cir. 1981).

A bar admission essay
by its nature does not lend
either full-blown or
confrontational hearings.
that arise in the review

examinations involve judgment and discretion, e.g. writing style, knowledge of the law and the capacity to analyze factual situations and apply principles of law. See generally, Hoover v. Ronwin , 52 U.S.L.W. 4535, 4541, n.31 (U.S., May 14, 1984). Viewed in light of Mathews v. Eldridge , 424 U.S. 319 (1976), no hearing would be required to review essay examinations, if there exists an unlimited right to retake the bar examination.

> '[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. (cite omitted) [D]ue process is flexible and calls for such procedural protections as the particular situation demands. (cite omitted) Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. (cites omitted) More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of

> three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (cite omitted)

Id at 902-903.

Balancing the interest involved, under the three pronged Mathews test, reveal that Vermont's unlimited right to re-examination weighs significantly in Appellee's favor, especially since Vermont offers bar examinations every six months. If a hearing were to be afforded: 1) the applicant's interest would not be advanced because of the time factors involved; 2) the risk of erroneous decision making would not be lessened; and 3) the additional

administrative and financial burden on the Vermont Supreme Court would be inordinate.[7]

Procedural due process should not require governments or individuals to participate in exercises that benefit neither party. Form should never prevail over substance. Vermont's system of unlimited re-examination every six months operates in everyone's best interest. Given the interest involved, the quantum of process that is due an unsuccessful applicant is amply provided for by the rules of admission of the Vermont Supreme Court. No substantial federal question has been raised by the denial of review for grading errors.

2. THE RECORD IN THIS CASE INDICATES THAT THERE ARE NO FACTS TO SUBSTANTIATE A CONCLUSION THAT THIS PARTICULAR APPLICANT DID NOT RECEIVE ALL OF THE PROCESS THAT WAS CONSTITUTIONALLY DUE.

Appellant seeks to have this Court rule as a matter of law that refusal by the Vermont Supreme Court to regrade and substitute its judgment for that of the Board of Bar Examiners is a violation of due process.

It is ironic that Appellant places significant reliance on Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), (Frankfurter, J., concurring) Schware stands for the proposition that this Court will exercise extreme caution in reviewing individual admission decisions:

> It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular State for admission to its bar.... Especially in this realm it is not our business to substitute our judgment for the State's judgment--for it is the STATE in all the

> panoply of its powers that is under review when the action of its Supreme Court is under review.

Id. at 248

The requisite level of specificity that would mandate review in an individual bar admission case is not present. The type of review necessary to make an informed decision given the facts presented by Appellant would constitute an unwarranted intrusion into the province of the Vermont Supreme Court for, "[A]dmission to practice in a state and before its courts necessarily belongs to that State." Schware, supra, 353 U.S. at 248 (Frankfurter, J., concurring).

In order to conclude that a substantial federal question exists, this Court would have to substitute its judgment for that of the Vermont Supreme Court and find that some arbitrary,

capricious, discriminatory unreasonable conduct[8] occurred.

Zucht v. King , 260 U.S. 176-177 (1922) read in conjunction Charleston Association v. Alderso 324 U.S. 182, 187 (1945) require this appeal must both raise substantial question and explic attack the statute under considerati

The statute under consideration the Rules of Admission to the Bar of Vermont Supreme Court. Section 5 of those rules provides:

> Applicants for admission demonstrate the min professional competence neces to engage in the practice of including but not limited to: knowledge of the statutory common law, (2) capacity to ana factual situations and a principles of law to them, and facility for written expression.

Appellant, in order to show existence of a substantial fed

question, must: (1) demonstrate tha grading discrepancies exist in light o the standards of Section 5; and (2) sho that the Vermont Supreme Court, wit notice of these allegations, faile either to entertain these questions o to render a decision based on th record. No showing of this type ha been made by Appellant in any stage o this case.

All that Appellant has done ha been to tally the number of issue raised in his essay examination an compare it with the number of issue raised in the model answers. This woul probably suffice if the examination wer simply an exercise in "issue spotting" On the information presented Appellant, this Court can only specula as to which of the critera in Secti 5(b) that Appellant was found to

deficient. Appellant's conclusory of "serious grading discrepancies never been substantiated particularity. He merely analyze of several grading criteria. Ther innumerable other adequate reason he could have failed the examination, despite the numbe issues he raised, eg., lack of kno of the statutory or common la inability to analyze factual situ and apply the law to them; o inability to write well. These a addressed.

The speculative nature Appellant's assertions would r this Court to review or regrad essay examination. This Court not have to undertake a task of magnitude on behalf of Appellant.

Full review is available in V

when misconduct is shown.[10] Otherwise, in grading cases, what each unsuccessful applicant would want "to do is challenge the conclusion of a particular grader that the written response to a particular essay question was inadequate". Lucero v. Ogden, 718 F.2d 355, 358 (10th Cir. 1983). The Vermont Supreme Court would either be required to regrade each failing examination or perform the onerous task of reviewing for fairness every six months[11] the grading process See, eg Cupples v. Marzall, 101 F.Supp. 57 (D.C. 1952).

Schware created a rebuttable presumption that the process of review for bar admission is fair and unbiased. Jurisdiction was granted in Schware because the presumption was rebutted when it was shown that the New Mexico

Supreme Court had abused
discretion. The New Mexico Su
Court acted contrary to the
contained in the record when it
"the petitioner the opportunit
qualify for the practice of law"
at 247. This Court stated that:

> The State contends that
> though the use of aliases
> arrest, and the membership i
> Communist Party would not j
> exclusion of petitioner fro
> New Mexico bar if each stood
> when all these are combine
> exclusion was not unwarranted
> cannot accept this contention
> light of petitioner's fo
> showing of good moral char
> the evidence upon which the
> relies--the arrests for of
> for which petitioner was n
> tried nor convicted, the use
> assumed name many years ago
> membership in the Communist
> during the 1930's--cannot be
> to raise substantial doubts
> his present good moral char
> There is no evidence in the
> which rationally justifie
> finding that Schware was m
> unfit to practice law.

Id. at 246-247.

Appellant was provided wi

opportunity to demonstrate to
Vermont Supreme Court that the grad
of his examination was arbitra
capricious, discriminatory
unreasonable. Appellant was given
opportunity to compare his performa
with the model answers, to ra
questions of fairness, and to m
explicit legal arguments regarding
method of evaluation before the Chair
of the Board of Bar Examiners and
Vermont Supreme Court. This Court
"not ... concerned with the grou
which justify denial of a license
practice law, but only with
procedural due process requires if
license is to be withheld." Willner
Committee On Character, 373 U.S.
103 (1962).

Appellant has failed to show
either the review afforded to him by

Vermont Supreme Court was not me
or that serious grading discr
exist. The scope of his revie
the Vermont Supreme Court was pr
upon his ability to demonstrate
grading discrepancies. The ge
his problem lies in his fai
recognize that Vermont's bar exa
is comprised of more criter
"issue spotting". This problem
magnified when Appellant atte
state his case as invol
substantial federal question. T
necessary to support the conclus
a substantial federal quest
present do not exist.

CONCLUSION

Due process is one of the complex areas of the law. It flexible concept with multifa aspects that are directly proport to the differing factual settings give rise to its discussion. through clarity of thought and allegiance to the interest protected can the decisions of Court have precedential value applied to this case.

Appellant complains about quantum of process that he received he requested review of his examination and when he soug declaration that Vermont's rule review for unsuccessful cand constitute a *per se* violation c process. In *Schware v. Board o Examiners*, 353 U.S. 232 (1957

Willner v. Committee on Chara
U.S. 96 (1963), the cases rel
Appellant, the interest soug
protected did not involve the
the process afforded. Rat
challenges attacked the s
application of the rules or t
that occurred in implemen
rules.

The amount of process nec
protect those interest
quantitatively different f
present case. Appellant her
the rules, not the process
under them. Moreover, the ver
Appellant asserts here, protec
arbitrary, capricious, discrim
unreasonable decision-makin
adequately protected under the
admission of the Vermont Suprem

No substantial federal que

been raised by the Appellant. This matter should be dismissed.

Respectfully submitted,

STATE OF VERMONT
Jeffrey L. Amestoy
Attorney General

By:

Samuel E. Johnson
Assistant Attorney General
109 State Street
Montpelier, Vermont 05602
Attorney for Appellees

[1] Vermont Statutes Annotated, Title 12, App. I, Pt. II §10(e),(f) and (g) (Supp. 1984) provide:

> (e) The decision of the Board as to which applicants pass and which applicants fail an examination shall be final, except upon showing of misconduct on the part of one or more members of the Board.
>
> (f) An applicant who takes and fails to pass the essay or Multistate Bar Examination part of the bar examination may petition for review by the Board. The petition must be made in writing to the Clerk of the Supreme Court within thirty days of mailing of the examination results. The Board need not explain the grade received but shall provide review as follows:
>
> 1) a photocopy of the applicant's essay examination answers;
>
> 2) a copy of a model answer, a grading guide and a typical best answer for each question;
>
> 3) handscoring by Educational Testing Service of the Multistate Bar Examination;
>
> 4) verification of arithmetic computations for the essay examination; and
>
> 5) verification of grades reported.

(g) Within fourteen days of mailing the review results provided for in §10(f), an applicant may appeal to the Chairman. The appeal shall be in the form of a written petition which shall set forth specifically and in detail any claim of misconduct by an examiner or the Board. The Chairman shall render a ruling in writing within thirty days of receipt of the petition as to whether the appeal has substantial merit. If the Chairman finds substantial merit to the appeal, it shall be referred forthwith to the full Board, less any examiner whose conduct is the subject of the appeal. If the Chairman finds no substantial merit to the appeal, the Chairman shall inform the applicant in writing of the decision, which shall be final.

2 See footnote 1.

3 Vermont Statutes Annotated, Title 12, App.I, Pt.II, §14(b) (Supp. 1984) provides:

> Except as otherwise provided by these Rules any individual may appeal from a decision of the Board of Bar Examiners by filing an action with the Vermont Supreme Court as a matter of original jurisdiction pursuant to the Rules of Appellate Procedure.

4 See appellant's jurisdictional statement Appendix B.

5 The rules for admission to practice do not specifically deny an applicant

the right to review based on grading errors. It does restrict review to instances of misconduct by an examiner. If the grading error is the product of misconduct, it is reviewable. The burden lies with the applicant to show such misconduct.

6 The rules of admission set no limits on the number of times an unsuccessful applicant may take the exam. The former rules did have restrictions (See former Rule 4, §5, Vermont Statutes Annotated, Title 12, App.I, Pt.II), but these were replaced on September 17, 1982, (Vermont Statutes Annotated, Title 12, App.I, Pt.II) and these former rules are inapplicable to the present case.

7 See , Tyler v. Vickery , 517 F.2d 1089, 1104-1105 (5th Cir. 1975).

8 See , Whitfield v. Illinois Board of Law Examiners , 504 F.2d 474, n.7 (7 Cir. 1974.

9 Vermont Statutes Annotated, Title 12, App.I, Pt.II, §5.

10 Vermont Statutes Annotated, Title 12, App.I, Pt.II, §10(e).

11 The bar examination is given every six months. Vermont Statutes Annotated, Title 12, App.I, Pt.II §10(c).

PROOF OF SERVICE

I, Samuel E. Johnson, Assistant Attorney General, appearing as counsel for appellees herein, depose and say that on the 30th day of May, 1985, I served 40 copies of the foregoing Motion to Dismiss properly addressed to the Clerk of this Court and three copies on the following parties by depositing the same in the United States post office, First Class postage prepaid to:

William E. Mikell, Esq.
P.O. Box 587
Burlington, Vermont 05402

Date: May 30, 1985

Samuel E. Johnson
Asst. Atty. General

Subscribed and sworn to before me this 30th day of May, 1985.

NOTARY PUBLIC
My commission expires
February 10, 1987